

***United States Court of Appeals
for the Second Circuit***

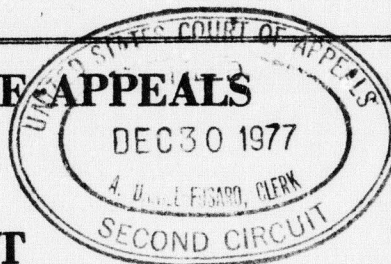


**BRIEF FOR
APPELLANT**

ORIGINAL
WITH PROOF
OF SERVICE

12/30
77-6179

UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT



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P/S

EARL P. HOPPER, JR., by his father and next friend, EARL P. HOPPER, SR.; MICHAEL J. BOSILJEVAC, by his wife, next friend and Conservator-Guardian, MARY K. BOSILJEVAC; ROBERT A. BRETT, JR., by his father, next friend and Guardian-Conservator, ROBERT A. BRETT, SR.; NICHOLAS G. BROOKS, by his father and next friend, GEORGE L. BROOKS; SHEIDON D. SCHULTZ, by his father, next friend and Trustee (Guardian), GEORGE A. SCHULTZ; DONALD E. SHAY, JR., by his father, next friend and Guardian, DONALD E. SHAY, SR.; JONATHAN B. BEDNAREK, by his father and next friend, JOHN BEDNAREK; VINCENT A. CHIARELLO, by his mother and next friend, ANNE CHIARELLO; JOSEPH PETER FANNING, by his wife and next friend, LINDA FANNING; PAUL O. MEDER, by his wife and next friend, JANE M. MEDER; JOHN F. O'GRADY, by his father and next friend, JOHN M. O'GRADY; LEONARD ROBERTSON, by his father and next friend, STRUAN ROBERTSON; PHILIP CRAIG, by his brother and next friend, JOHN P. CRAIG; BRENT E. DAVIS, by his father and next friend, RUSSELL H. DAVIS, JR.; HARLEY H. HALL, by his wife and next friend, MARY LOUISE HALL; DONALD F. LINDLAND, by his wife and next friend, BARBARA ANN LINDLAND; JAMES M. ROZO, by his father and next friend, SAMUEL ROZO; CHARLES E. SHELTON, by his wife and next friend, DOROTHY M. SHELTON; ROBERT L. STANDERWICK, by his wife and next friend, CAROLYN STANDERWICK; MICHAEL B. VARNADO, by his father, next friend and Curator (Guardian), HOUSLEY VARNADO; and MILTON J. VESCELIUS, by his wife and next friend, JEANENE VESCELIUS,

Plaintiffs-Appellants.

-against-

JAMES E. CARTER, JR., President of the United States; HAROLD S. BROWN, Secretary of Defense; JOHN C. STETSON, Secretary of the Air Force; CLIFFORD L. ALEXANDER, Secretary of the Army; and W. GRAHAM CLAYTOR, JR., Secretary of the Navy,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFFS-APPELLANTS

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QUESTIONS PRESENTED

1. Was it error and an abuse of discretion for the District Court, while informed of details of the proof which plaintiffs offered and wished to submit on the issue of threatened irreparable injury, during an evidentiary hearing on an application for preliminary injunction, to exclude such testimony on numerous occasions, to state that such testimony was "unnecessary" and then to deny the application upon the grounds, inter alia, that there had been no proof of threatened irreparable injury?

2. Was it error and an abuse of discretion for the District Court to deny an application for preliminary injunction, staying determinations of death of captured and missing United States servicemen, under 37 U.S.C. §§ 555 and 556, while the constitutionality and legality of those determinations were litigated, where the District Court was informed that irreparable injury was threatened and the evidentiary record established, without challenge or contradiction, each of the factual allegations in the complaint with respect to unconstitutional application of the challenged legislation and with respect to the arbitrary and capricious conduct of the defendants in implementing that legislation?

3. Was it error and an abuse of discretion for the District Court to deny an application for preliminary injunction, staying such determinations of death, where the District Court was informed that irreparable injury was threatened and the evidentiary record demonstrated, without contradiction or challenge:

(a) the suppression and withholding of relevant, available information from those who would protect the interests of POW's and MIA's threatened with determinations of death, making it impossible to effectively represent these men or even to arrive at an informed decision as to what and how much one should do for them;

(b) the POW's and MIA's who are subjected to proceedings which lead invariably to determinations of death are deprived of all opportunity to have their interests represented and reasonably protected;

(c) the proceedings which lead invariably to determinations of death are so completely arbitrary and unreasonable, for a wide range of separate reasons, that no pretense of due process or fairness can be maintained?

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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:
EARL P. HOPPER, JR., etc., et al.,
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Plaintiffs-Appellants,
:
-against-
:
JAMES E. CARTER, JR., etc., et al.,
:
Defendants-Appellees.
:
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BRIEF FOR PLAINTIFFS-APPELLANTS

STATEMENT

This is an appeal by the plaintiffs-appellants from an Order and Decision of the United States District Court for the Eastern District of New York, Weinstein J. (A-844,846)* denying an application for a preliminary injunction staying the defendants-appellees from activities and proceedings which lead to determinations of death,

*References in parentheses are to pages of the Joint Appendix.

respecting captured and missing American servicemen, under 37 U.S.C. §§ 555 and 556, while the constitutionality and legality of those determinations are being litigated.

THE FACTS

The plaintiffs are twenty-one servicemen who are or were in captured or missing status and who have been subjected to or are now threatened with determinations of death under the Missing Persons Act (37 U.S.C. §§ 555 and 556). These determinations and the activities and proceedings which produce them are subject to Due Process requirements because one of the consequences of a determination of death is the termination of military pay and allowances and other benefits. Thus, the loss of protected property interests are involved.

The Complaint charges, in four counts, that the challenged legislation violates due process rights, both facially and as applied, that the determinations are arbitrary, capricious and unlawful and that they wrongfully deprive the subject servicemen of substantial rights and interests.

Count I of the complaint alleges that the legislation is facially unconstitutional because of each of four (4) separate, independent defects:

(a) the absence of statutory provision for notice and a hearing opportunity for the subject MIA personally or by a representative of his who is free of conflicting interests;

(b) the absence of statutory criteria to guide the Secretary concerned as to whether to review the status of a serviceman and as to whether or not to make a determination of death;

(c) statutory provisions purporting to authorize determinations of death in the total absence of any evidence or information as to the fact of death;

(d) the absence of a statutory grant of rule-making authority respecting

determinations of death, which results in proceeding on a case-by-case basis merging rule-making and adjudicative functions of the Secretary concerned. (A-25, 26)

Count II of the complaint alleges that the challenged legislation is implemented in an unconstitutional manner because of each of thirteen (13) separate, independent defects. (A-26-29). These thirteen (13) defects are described in more detail later in this brief, together with the proof, respecting them which was submitted to the District Court.

Count III of the complaint alleges that the determinations of death are arbitrary and capricious because:

(a) they are made in the total absence of supporting evidence or information and;

(b) there is a failure diligently to search for and utilize all available evidence and information as a result of which a vast amount of such evidence and in-

formation, which is available, is not presented to or considered by the adjudicators of the fact of death. (A-29-31).

Count IV of the complaint alleges the loss by the subject MIA's and POW's, through determinations of death, of benefits which innure to them under the Paris Agreement of 1973. (A-31,32).

Shortly after the filing of the action, plaintiffs moved for a preliminary injunction to maintain the status quo and bar further determinations of death while the issues are being litigated. (A-34-81). Defendants cross-moved for dismissal under Rule 12(b) F.R.Civ.P. (A-82-162). Although they did not identify which subdivision of Rule 12(b) they relied upon, they appear to have moved under Rule 12(b)(6) - a contention that the complaint failed to state a claim for which relief can be granted.

A four-day evidentiary hearing was held on the motions. The transcript of that hearing is in the Appendix (A-301-752).

As shown in that transcript, and discussed in detail later in this brief, unchallenged and uncontradicted

proof was submitted to the District Court supporting each and every allegation pleaded in Counts II and III of the complaint. In addition to this specific proof, a substantial body of supplemental proof was presented at the evidentiary hearing which established, without challenge or contradiction from the Government, that:

(a) a pattern of suppressing and withholding information which can and should be made available to those who would wish to protect the interests of POW's and MIA's threatened with determinations of death, makes it impossible to effectively represent these men or even to arrive at an informed decision as to what and how much one should do for them;

(b) The POW's and MIA's who are subjected to proceedings which lead invariably to determinations of death are deprived of all opportunity to have their interests represented and reasonably protected;

(c) The proceedings which lead invariably to determinations of death are so completely arbitrary and unreasonable, for a wide range of separate reasons, that no pretense of due process or fairness can be maintained. Furthermore, the District Court was informed of and proof was repeatedly offered on the details of threatened irreparable injury.

In the face of this unequivocal record, the District Court denied the application for a preliminary injunction. Its opinion (A-846) and order (A-844) are in the Appendix. At the same time, the District Court denied the defendants' cross-motion, thereby holding that the complaint was at least adequate on its face.

Plaintiffs-Appellants, in this appeal, seek review of the denial of their application for a preliminary injunction. Our position is that denial of that application, in the face of such unequivocal record, was error and an abuse of discretion. In addition, we submitted that it was error and an abuse of discretion to prohibit the introduction of proof of threatened irreparable injury (A-324,328,486-487),

details of which proof were made known to the District Judge (A-487, 834-843), and then to base the denial of a preliminary injury upon the alleged absence of such evidence.

To support these positions, it is necessary, now, to analyze the record and to show the breadth and depth of the uncontradicted proof, which was offered and submitted during the evidentiary hearing.

The Threat Of Irreparable Injury

The financial consequences of a determination of death under the Missing Persons Act are substantial and definite. The pay and allowances of the subject serviceman terminate (A-552). Use of a Government savings account (the "U.S.S.D.P. account") earning 10% interest, ceases. (A-552,3). There is a substantial decrease in the income of the subject serviceman and that of his family (A-560).

Upon a determination of death, the assets of the subject serviceman are distributed to others and there is no provision for their recapture if the determination is later rescinded (A-553, 637).

The legal costs and disbursements of effectively defending against a determination of death in one typical case exceeded \$15,000.00 (A-688-701). If, because of the procedural defects discussed infra, such determinations must be rescinded

and relitigated, the absence of injunctive relief will have increased the cost of due process by doubling the legal expenses. This is not an objection merely to payment of legal costs. It is an objection to the burden of having those expenses doubled.

The possibility of ever restoring any rights or interests lost due to a faulty determination of death are remote if they exist at all and are further impeded by the fact that the subject serviceman's dependents, who are the persons most likely to fight effectively for his rights, are hindered because of their own serious loss of income. Having been driven to the economic wall, they are the less able to struggle for him.

During the evidentiary hearing before Judge Weinstein, the plaintiffs informed the Court of these economic consequences (A-487, 834-843)* and were repeatedly barred by the Court from submitting proof of them. (A-324,328,486-487). On one such occasion, Judge Weinstein actually stated that such proof was "not necessary". (A-328). Judge Weinstein's denial that these elements of injury are present and substantial can only be attributed, we submit, to his refusal to listen to the offered evidence.

The defendants sought to minimize the threat

*This was done in Plaintiffs' Supplemental Pre-trial Memorandum given to the Court on the morning of the first day of the hearing, marked as Court Exhibit "2".

of irreparable injury by claiming, during the evidentiary hearing, a discretionary power to repay lost and distributed pay and allowances and U.S.S.D.P. monies in the event that a subject of a faulty determination of death should not only continue to survive but also actually return alive. (A-552-557,634-638,681)

It should be noted that there is no certainty in any of this -- it is a mere discretionary possibility at best. On two separate occasions, the plaintiffs offered proof that even when each item of "evidence" originally used to accomplish a determination of death has been proven to be erroneous, the Department of Defense refuses to rescind that determination (A-330-485). Judge Weinstein, on each occasion, refused to permit this evidence into the record.

There are very serious limitations on this alleged repayment power which deprive it of real meaning (A-681). It was conceded during the hearing that it is, at best, a discretionary benefit which the Secretary may or may not elect to bestow (A-552-557,634-638,681). There are no established criteria as to whether he must do so in any given situation. In instances where a double payment is involved, because

assets have been distributed in a Settlement of Accounts following a faulty determination of death, the repayments are expressly prohibited under 10 U.S.C. 2771(d) (A-324,556).

Furthermore, this discretionary power has never been purported to cover, and, in fact, it does not cover assets of a serviceman which do not fall under the categories of "pay and allowances" or "U.S.S.D.P. accounts", but which are distributed to others, without recapture provisions, following a faulty determination of death - such as securities, insurance, real property and other possessions.

Thus, the alleged ultimate restoration of economic loss is partial, at best, and it does not eliminate the threat of irreparable, economic injury. It requires not only the doubtful correction of a faulty determination but also the continued subsequent survival and return home alive of the subject serviceman. Then, maybe, he will be repaid for part of his losses. All of this was unequivocal and uncontradicted in the record of the hearing (A-552-557,634-638,681) - but it is not reflected in Judge Weinstein's decision.

Apart from these threats of irreparable economic injury, other significant interests are also threatened. It is a matter of common knowledge that after a determination of death, the relationship of the subject serviceman, as a continuing member of his own family, disintegrates. As to him, the family does not survive.

One of the defendants herein happens to have had a long, personal exposure to this type of loss. Attached hereto as Exhibit "A" is a copy of pages 41 and 42 of President Carter's book, "Why Not The Best?". In that extract is told the history of the President's uncle who was erroneously declared dead during World War II and whose family disintegrated as a result. That man returned alive, but he spent the balance of his life disassociated from his wife and children. This sort of family reorganization usually occurs following a determination of death and often cannot be undone when and if a faulty determination is later rescinded. We respectfully submit that such a threat to the survival of a family, as a family, is subject to due process protections.

During the evidentiary hearing, Government witnesses confirmed the indisputable fact that missing status offers a

degree of protection and enhances the survival chances of the individual who is the subject of that status. (A-589,667). This area of irreparable loss was also shown by an affidavit of Stephen R. Frank, demonstrating a North Vietnamese contention that Article 8(b) of the Paris Agreement obliges them to furnish information only with respect to men who are, in the words of the Agreement, "still considered missing in action" and that there is no such obligation with respect to men who are not "still considered missing in action" (A-884-885).

The Frank affidavit has never been contradicted. To counter its effect, government witnesses at the evidentiary hearing tendered their usual claim that the efforts of the United States to achieve an accounting remain unchanged after a determination of death (A-665).

The problem here is that "it takes two to tango". Since it is the other side which is in possession of the needed information, the extent and duration of the American quest for an accounting is close to irrelevant if we furnish the Vietnamese with the determinations of death which

they view as liberating them from the duty to account.

During the evidentiary hearing, one government witness seemed to confirm this when he testified that the Vietnamese had been told that, from our viewpoint, their obligation, under the Paris Agreement, to account was unchanged by determinations of death. The testimony continued that the Vietnamese listened, but made no response. (A-664,665).

The Frank affidavit remains unrebutted. The threat remains to the contractual obligation of the Vietnamese, under the Paris Agreement, to render the accounting which is the only dependable way to learn who is alive and who is dead. From time to time, they may volunteer this or that piece of information. But if their perception of their duty to furnish such information is released by an unlawful and unconstitutional determination of death, the subject of that determination is exposed to a very real and substantial threat of irreparable injury. An accounting for a man who is now presumed to be alive is a matter of truly substantial consequence.

We respectfully submit that if the plaintiffs-

appellants have not demonstrated an adequate threat of irreparable injury, that showing could probably not be made by anyone in any case brought to Court. We believe that it has clearly been done here.

Violation of Due Process Rights.

As indicated above, Count I of the Complaint alleges facial unconstitutionality. Therefore, it did not call for factual testimony on the evidentiary hearing since the challenged legislation, on that Count, stands or falls on its own merits. Evidence on Count IV (Loss of International Law Rights) was excluded by Judge Weinstein.

(A-320).

Thus, the evidence that was submitted pertained to the allegations in Counts II and III of the Complaint. We respectfully submit that as to those Counts, the contradicted testimony of due process violations is overwhelming. To demonstrate this, we shall now review each of the constitutional claims made by the plaintiffs in Counts II and III and, after each of them, to indicate in parenthesis the page numbers in the transcript where the evidence proving them is to be found.

Count II of the Complaint, in paragraphs 22(a)-(1) and 23, alleges specific violations of due process.

As paragraph 22(a) of the Complaint states, there is no procedure or requirement for the giving of notice to the subject MIA, either directly or to a representative of his who is free of conflicting interests, of the pendency of a status review and, in fact, such notice is withheld and such MIA and his representatives and their counsel are excluded from participation in any review before the adjudicators of the fact of death. (A-307,330,333,334,342,496,538)

As paragraph 22(b) of the complaint alleges, those who adjudicate the fact of death are never exposed directly to anyone who opposes the determination of death -- at best, in lieu of a genuine hearing, some persons, in some cases, are granted a "non-adversary" interview, under totally inadequate circumstances and conditions, with one to three "hearing officers" who, in fact, are responsible for prosecuting and obtaining the determination of death and who then indicate that they will convey to the adjudicators of the fact of death the views expressed during this interview. (A-308,309,333,334,490-496,498,508-519,526,531,535-540,607-608,610,613, 623,625,627-631).

As paragraph 22(c) of the Complaint alleges, no criteria, standards or policies have been issued to guide or govern the Secretary concerned in his decision as to whether or not to make a determination of death and the Secretary concerned proceeds only on a case-by-case basis. (A-310, 410, 514, 515, 525, 627) . . . Nowhere was the impact of an absence of standards and criteria more apparent than at pages 591 through 600 of the Appendix where the Court asked various Service representatives what the outcome would be in a case where the evidence was "50-50" as to whether the subject MIA was alive or dead, with all factors considered including the passage of time. The Air Force representative and the Navy representative both stated that under those circumstances the man would be declared presumptively dead. The Marine representative and the Army representative stated that under those circumstances the man would be continued in missing status. (A-591-594). Interestingly, none of these service representatives are the individuals who make those actual decisions. A Department of Defense representative then stated that the Secretary of Defense would continue the men in missing status under such circumstances (A-594-600). This is odd since, under the statute, it is not the Secretary of Defense who makes that decision. The Navy representative

further indicated that the problem, as presented by the Court, was difficult to handle because such elements as the passage of time are "most important" (A-620). Finally, the Marine representative was asked to explain the disparity in results which had been expressed by the various witnesses. He stated that the outcome would ultimately depend upon the different "subjective judgment" of whoever reviews the record of various individuals - there are "no exact standards" for recommendations on determinations of death - it turns on a "subjective reaction" to what is seen, on a case-by-case situation, and no fixed criteria exist to apply to all cases (A-627). Thus, there is so much "subjective reaction" and so little objective criteria that no one can tell what is right and what is wrong. It is like sending a jury to decide a case without instructions or guidance.

As paragraph 22(d) of the Complaint alleges, the Secretary concerned, as a matter of course, makes determinations of death in the total absence of any evidence or information of the fact of death. (A-311,518).

As paragraph 22(e) of the Complaint alleges, the Secretary concerned routinely fails to convene, conduct or participate in any hearing whatsoever prior to the making

of determinations of death whenever so requested by a next-of-kin who is a recipient of governmental benefit, regardless of whether or not such next-of-kin has interests which are antagonistic to or inconsistent with the interests of the subject MIA. (A-311,312,333-336,498,506,540,610,629,706).

As paragraph 22(f) of the Complaint alleges, status reviews which can, and regularly do, lead to determinations of death are authorized to proceed, and such determinations are authorized to be made while the search and accounting effort for the subject MIA is still being actively pursued and before it has been completed or all known sources of information have been fully examined and the results made known. (A-312,313,344,519-524,649-651,661).

As paragraph 22(g) of the Complaint alleges, there is no requirement nor is any adequate effort made to marshal, organize and present to the adjudicators of the fact of death, all of the relevant evidence and data in the possession of or available to the United States Government at the time that the status review occurs and, in fact, a vast amount of such evidence and data is routinely and deliberately suppressed and withheld. (A-313,348,402,519-524,541,544,613, 615,701,702,710,711).

As paragraph 22(h) of the Complaint alleges, the adjudicators of the fact of death at a status review are required to ignore, and do refuse to consider, any information or evidence which happens to be classified regardless of its nature and regardless of its relevance to the issue of whether death has occurred. (A-314,346-348,377,378,565-567,616, 688-691,711).

As paragraph 22(i) of the Complaint alleges, no witnesses appear at a status review to testify and submit to cross-examination, but, instead, short written summaries are submitted of the Government's "evidence" in favor of a determination of death, consisting, in the main, of sanitized and remote hearsay which cannot be tested for truthfulness, completeness or reliability. (A-314,571-574).

As paragraph 22(j) of the Complaint alleges, there is no provision for or opportunity for formal factual discovery in preparation for a status review. (A-321,322, 341,346-350,390,391,580,582).

As paragraph 22(k) of the Complaint alleges, there are no rules of procedure and no rules of evidence whatsoever governing status reviews. This was completely established

with respect to rules of evidence and substantially established with respect to rules of procedure. (A-315,490-495, 515,583-585).

As paragraph 22(1) of the Complaint alleges, status reviews are so structured and conducted that they become punitively and prohibitively expensive to those who wish to protect MIA rights. (A-316,323,687,693-702).

As paragraph 23 of the Complaint alleges, each of the plaintiffs and each member of the plaintiff class is or has been "continued in missing status", either because he was believed to have been alive or there was no adequate basis for a determination of death, and ~~that~~, by a change of policy, those opposing determinations of death, though deprived of information, are required now to prove present survival -- this is a complete reversal of the burden of proof and status reviews, which have been premised on a presumption of continuing life, are now premised on a presumption of prior death -- this reversal of the burden of proof and these changes in the threshold presumptions occurred without notice or hearing and adversely affect the rights of the subject MIA's. (A-316,379,586-588,590-600,613,700-701).

As Count III of the Complaint, in paragraphs 25 through 29, alleges determinations of death are made in the absence of evidence or information that the fact of death occurred but solely on the basis of a purported lack of information. Furthermore, ~~that~~ the resulting determinations are arbitrary and capricious because the lack of information is the product of a failure of the defendants to diligently search for and ascertain all available evidence and information about the subject MIA and their failure to inquire whether additional evidence or information relating to him is available or can be made available. As a result, vast amounts of evidence and information, which are available, are not and have not been produced for use in proceedings which lead to determinations of death. (A-317,320-322,348,402,541,544,615,702,704,710).

In addition to the above itemization of proof in the record of the specific allegations in the Complaint, the following highly relevant facts are also established in the transcript without contradiction.

Status reviews under the Missing Persons Act precede and virtually invariably result in determinations of death. (A-398, 499, 502, 503, 506)

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These proceedings are necessarily unfair because of a widespread and unpardonable pattern of withholding needed information from those POW/MIA family members who would be willing to defend the rights of their respective men. Thus, the families are forced to seek on their own facts which the Defense Department withholds (A-702-705). Some next-of-kin may receive or be shown a copy of the allegedly complete "open file" (A-350,447,534) but even this "file" is incomplete (A-346,391,404,412,417,421, 430-432,433,440,444-449,482) and is only available upon the consent of a next-of-kin receiving governmental benefits (A-534,535).

It is consistently difficult to extract facts from the government (A-361-367,442,702). There is simply not enough information revealed for anybody to adequately represent the interest of the subject serviceman in a status review proceeding (A-385,397,399,400,402,403,443,455,456,458,688-691 700-701, 708). Information is arbitrarily withheld (A-402,702-706). Freedom Of Information Act demands go unanswered (A-320-323,449,671-672). Even on the evidentiary hearing, subpoenaed documents were not produced (A-483,723-725).

. The withholding of data necessitates the expensive retention of counsel (A-708). The families cannot tell

how much is being withheld or what use could be made of it unless they obtain access to the information itself (A-713). The practice is widespread -- indeed, as one Department of Defense representative (Capt. Vohden) stated during the hearing, "There are many men like Mr. Brooks. Twenty-five Hundred". (A-451).

If this had occurred in isolated cases, it just might have been understandable. However, the uncontradicted and unchallenged record shows that the witnesses who testified in this regard were typical of other POW/MIA families (A-434,478,686).

Eventually, those with the ability and persistence to penetrate this wall of secrecy and obtain some access to so-called "files" (A-361-367,442,702), found chaos and misinformation in the records. These "files," which were incomplete when given to the family become increasingly unreliable thereafter because they are not supplemented with the additional data added later to the "files" at the Casualty Office. Consequently, they quickly become obsolete and useless. (A-575,576). Significant material is omitted from these "files" (A-403,404). Numerous different "files" are maintained in various locations by various

officials (A-347-349,385,391,403,440,444,445) and these "files" are often in conflict with one another (A-350,358,436, 439,440,444,445). Throughout the transcript there are an abundance of evidence showing the inadequacies of these "files" (A-380,383,391,394-396,399,401-405,413,416,421, 427, 430, 433, 436-439, 444, 445, 449-454, 482,702). The unwarranted wholesale omission of information obtained through Intelligence is unpardonable. (A - 413-420, 439-440, 445, 450-454, 688-691). One example was the attempt to conceal a foreign broadcast interception report from the MIA's family in the Bosiljevac case (A-361-365).

The trial Court was furnished papers that the Government claimed constituted the full "DIA file" for Capt. Bosiljevac for comparison with the "open file." This led the Court to conclude that substantially all of the material in the "DIA file" was in the "open file"(A-725). Since the evidentiary hearing, however, that family has obtained a copy of the "DIA file" and has compared it with the "open file" which they had previously received. They have found several very substantial discrepancies -- so much so that the family now questions whether they and the Judge were actually exposed to the same files. (A-917-923).

Another example concerned evidence of a CIA file on the plaintiff Brooks. When asked about this in open court, Capt. Vohden requested permission to speak privately with the Judge and when this was denied, he stated that he knew nothing about that file. (A-450-451) This is the same Capt. Vohden who also testified that "There are many men like Mr. Brooks. Twenty-Five Hundred". (A-541). The Court subsequently directed defendants to get more information on this. (A-454). But the record is barren as to the results of that inquiry, except for one intimation that the Government had "answered" the Court's inquiry. (A-722). Nobody bothered to tell the plaintiffs, during the hearing, what that answer was.

From some, but clearly not all, of these flagrantly unreliable "files" there are constructed the "summaries" which become the primary source of data in status reviews (A-353-357). These "summaries" themselves are grossly misleading, incomplete, erroneous and inadequate (A - 318, 357-358, 368-378, 395, 401-402, 413, 416).

It is from this posture that the Services approach status reviews leading to determinations of death. As indicated above, the procedure is simplified if next-of-kin

receiving governmental benefits elect to waive their personal right to a hearing because, then, the rights of the subject MIA are ignored and the determination of death is granted on request without any hearing at which the MIA's rights can be protected. (A-311-312, 333-336, 498, 506, 538, 540, 610, 629, 706). In fact, there has not been a single instance since the Paris Agreement was signed in January 1973, where a request for a determination of death by a recipient of governmental benefits has not been granted. Even in cases where the antagonism between the interests of the requesting recipient of governmental benefits and the subject MIA are open and obvious, the execution of a hearing waiver by the recipient of governmental benefits is used by the defendants to obliterate hearing rights which could have provided protection for the personal interests of the subject MIA. (A-307, 333-335, 496, 712-916).

Such hearing waivers, however, should not be attributed solely to venality on the part of recipients of governmental benefits. In view of the misleading, inadequate maintenance of "files" and "summaries" and of the pattern of withholding material information and of representing incomplete files as complete (A-412, 417, 440, 444, 445, 482, 702) many of these people, though believing

that they knew the facts, were really in no position to make an informed decision.

In each case where a hearing is not waived, the Casualty Office of the subject MIA's Service branch prepares for a "hearing" -- or, as one Government-produced witness said, they "line up the cases". (A-512) The inadequacies of that preparation simply destroy the integrity and the potential for fairness in the subsequent "hearings".

The decision to call a review is made by the head of the Casualty Office on the advice of his staff (A-511), by whom the cases and the personnel who will deal with those cases are "lined up". (A-512) The staff then reviews the "file" and drafts the "summary" in preparation for the review (A-515, 516). The Casualty Officers recognize a responsibility to seek out documents and to assemble a "file" for the review (A-519, 526). In doing this, they only go to the Defense Intelligence Agency (DIA) and the Joint Casualty Resolution Center (JCRC) and ask only for information that "pertains" to the man involved. (A-520) They do not go to the State Department or to the CIA to obtain information there. (A-521, 522, 527, 528) They do not know if these agencies have turned over whatever material they have. (A-522)

They do not attempt to decide what is relevant, but just try "to collect what we need". (A-524).

It is clear that there is a vast volume of documents which have not been indexed or filed and which are referred to as "uncorrelated" files. (A-321, 322, 520, 671, 672) The Casualty Office know that these exist and are voluminous but do not know what they contain. (A-520, 523) In preparing for a status review, they do not look at these "uncorrelated" documents (A-541) and they do not know whether any of them have been incorporated into the "files". (A-544) As one government-produced witness stated, they do not want to know about material that has not been previously correlated to the subject serviceman. (A-523)

The Government has been aware of the problem which "uncorrelated" files present since at least March 1975, that the materials involved are voluminous, and that some of these documents may not even have been inspected. However, it has done nothing to remedy the situation. (A-321, 322, 541, 544, 671, 672)

In short, the materials assembled for consideration on a status review come from a few select sources and there is no effort made to include the information

available from other sources. (A-313, 320-322, 348, 402, 519-524, 541, 544, 615, 701, 702, 711). This selectivity and this avoidance of available information demonstrates the arbitrary, capricious nature of the proceedings and condemns them.

The difficulties created by these conditions are further complicated by the manner in which classified and other materials which the Government wishes to withhold from family members are handled and by the fact that family members have no remedy to correct the defects and make information available. As indicated above, under the relevant Regulations, classified data is not received or considered at a status review regardless of its relevance. (A-314, 346-348, 377-378, 565-567, 616, 688-691, 711). A declassification program has been going on for some time. (A-568) It is not complete -- indeed, as one Air Force witness testified, they are constantly discovering new materials to declassify. (A-570) A substantial amount of declassification remains to be done. (A-562)

An effort was made on the record to convey the impression that only the names of spies who would be endangered by disclosure and the description of sensitive

information gathering methods will remain classified. (A-565-567, 618). The record indicates that this is untrue. It was admitted on the record that, even after declassification, some of the declassified materials are withheld from the information considered at status reviews. (A-615) Plaintiffs have reason to believe that discovery will establish that there is a vast amount of information withheld by over-classification. The Court seemed aware of this and, during the evidentiary hearing, actually took judicial notice not only of the fact that there is a great deal of over-classification, but that such over-classification continues even after the so-called "declassification". (A-567)

What then can be done, under the circumstances, to protect the rights of the subject MIA's? The clear answer is virtually nothing. There are no pre-hearing discovery rights. (A-580) If a family finds a need to contact a living available witness, the consistently followed policy of the Defense Department is to inform that witness of the family's desire to speak with him and, simultaneously, to instruct him that he is under no obligation to contact them. (A-572-574) There are no regulations or procedures to require the reluctant or disinterested witness to testify, either before the "hearing," or even at the "hearing". (A-582)

Faced with all of this inadequate record-keeping and paranoid secrecy, the families of MIA's who are the subjects of determinations of death under the Missing Persons Act have been deprived of virtually all effective opportunity to protect the rights of the subject serviceman and sometimes, at best, are graciously bestowed with a proceeding which, under the circumstances, is a sham and a charade. It should come as little surprise to learn that most of those family members, when faced with the choice of whether or not to proceed with such a "hearing", decide to stay at home. (A-499, 502)

The limited number who can demand and who elect to pursue a "hearing" encounter a truly, incredible experience. Although each Service has its own Regulations, they are substantially similar. During the evidentiary hearing the Court was supplied with copies of the Regulations, which purport to govern these proceedings. (A-103-105, 111-113, 126-139) In addition, an effort was made by a witness from the Air Force to characterize two "general", "advisory" letters that had been sent to POW/MIA's families as having the force and effect of Service Regulations governing the proceedings. However, it developed that this was unfounded. (A-531, 533) Perhaps the most interesting feature of these Regulations, apart from their vagueness, is that they are not followed. The record of the evidentiary hearing shows what really goes on at these so-called "hearings".

The relevant Regulations require that notice and an opportunity to participate in a hearing be extended to recipients of governmental benefits. (A-103-105, 111-113, 126-139) No one else has such rights under these Regulations. However, notice is sent to other people. (A-496, 609, 628)

In all branches of the Armed Services, if the recipient of governmental benefits sign a waiver of hearing there is no hearing whatever. (A-498, 610, 629). It has been confirmed that ^{NO} safeguards existed for cases where recipients of governmental benefits with interests in conflict with those of the subject MIA, might waive a hearing and obliterate the rights of the MIA. ³⁰⁷⁻³⁰⁹ (A-496) However, the Court refused to permit pursuit along this line. (A-496).

It was shown that such a hearing waiver can cause very serious results. The only case since the signing of the Paris Agreement in January 1973, in which the government's effort to accomplish a determination of death has ever been successfully resisted was the so-called Martin/James case. (A-502) There, after a vigorous and extremely expensive effort, the families were able to have the men continued in missing status. (A-316, 323, 686-701, 706). One of the two subject MIA's in that status review remained

in missing status, but, in the case of the other, at the request of a recipient of governmental benefits a hearing was waived shortly after his status had been continued as missing and a new "review", conducted on request, produced a predictable determination of death without a hearing. (A-506)

The fact that notice has been given does not guarantee rights. Thus, where there is no hearing waiver, next-of-kin other than a recipient of governmental benefits may be permitted to attend the hearing. (A-535) However, they may not participate or question or object. (A-538) If a hearing is not waived but the recipient of governmental benefits wishes to exclude other next-of-kin of the subject MIA, they will be excluded. (A-536, 610) The attendance and involvement of other next-of-kin, limited as it may be, was further described as strictly at the "sufferance" of the recipient of governmental benefits (A-540) whose interests may or may not coincide with those of the subject serviceman.

During the evidentiary hearing, a partial and highly sanitized version of portions of a Defense Department briefing given in March 1977 to the Woodcock Commission, was introduced. This briefing dealt with five different categories of men and discussed the relevant ease or difficulty

with which the other side could account for them. It established that an accounting should be expected in at least 1,339 of the 2,546 cases discussed. (A-472-474, 645-⁷⁹³⁻⁸¹² 648) This necessarily is relevant to the likelihood of a legitimate accounting being obtained for these men -- but these categories and this evidence is not considered. (A-548). This seems not to be among the data that "pertains" (A-520)

Furthermore, although there is an awareness in the Defense Department that current negotiations are under way to get an accounting, and that those negotiations are resulting in an exchange of information, the "hearing" involves no consideration of this and it has been decided not to await the product of such developments. (A-550, 649, 650, 651, 652, 659, 660, 661) Indeed, one government witness went so far as to say that he considered it perfectly "reasonable" to proceed without awaiting the outcome of this information exchange. (A-551) Apparently, this also does not "pertain". (A-520).

In prosecuting a status review seeking a determination of death, the government produces no witnesses -- only documents and written statements which cannot be subjected to cross-examination or other testing for truthfulness or completeness. (A-^{314, 571-574} 571) While a family may be permitted

to present a witness, they have no power or ability to compel his presence and, hence, they can only appear with live witnesses if they are lucky enough to find a volunteer who did not take the hint when the Department of Defense informed him that he was not obliged to cooperate with the family. (A-572-574) However, that family has the burden of proving that their MIA not only survived his casualty, but also that he remains alive still. (A-379, 388, 590, 613, 700-701)

There are no rules of evidence whatsoever and no effective rules of procedure. (A-584, 585) The Regulations described this as a "non-adversary" hearing. When the witness from the Air Force, who is in charge of orchestrating this performance was asked what "non-adversary" meant, the Court intervened and stated that he need not respond since he is not a lawyer. (A-517, 518) However, the witness from the Navy described the proceedings as "non-argumentative" which, under the circumstances, is probably saying quite a great deal. (A-613, 700-701) Under the circumstances, the program is designed to restrict the "participation" of the MIA's and their families to an exercise in dumb compliance.

One of the most interesting aspects of the evidentiary hearing was the amazing array of tests or criteria

that different people alleged are applied to determine the outcome of a status review. One non-lawyer government-produced witness after another was permitted to tell the Court that: a Preponderance of Evidence Rule applied (A-501, 591); less than a Preponderance (A-598); a "Probabilities" test (A-632); a Clear and Convincing Evidence test (A-598); a "Very Overwhelming" test (A-597); a "good reason to believe" the man is alive test (A-600-601); and a "good reason to believe" the man is dead test. (A-600) The Court was provided with a copy of Congressional testimony given by Maj. Gen. Walter D. Druen, that a "reasonable doubt" test is applied.

Finally, Maj. Matt Marshall of the Marines let the cat completely out of the bag when he testified that there was really no objective standard whatever and that it was all decided on the basis of "subjective reaction" of the individual who happened to be reading the file. (A-626, 627) This last admission is the closest to the truth. After all, it is clear that very many determinations of death (PFOD's) are made presumptively in the absence of any information. (A-311, 518). Clearly, "subjective reaction" is the only one of the various tests discussed, which could apply. It is an exercise in guesswork and speculation.

This problem of criteria arose when the Court, in an apparent effort to understand why and how certain things were done, asked each of the Service representatives present what the result of a status review would be in a case where all of the factors indicated equal probability that the subject MIA was dead and that he was alive. The Service representative gave different answers. The Air Force and the Navy representatives indicated that under those circumstances, the man would be declared presumptuously dead while the Army and Marines indicated that he would be continued in missing status. Thereafter, a representative of the Secretary of Defense indicated that all branches of the Armed Forces would be obliged to keep a man in continued missing status under these circumstances. (A-591-600, 620, 626, 627)

The problem with this line of inquiry was that it was addressed to the very individuals who do not adjudicate such questions. These Service representatives are involved in the preparation and presentation of cases from the government's point of view but not in the decision-making process. (A-508-510, 516, 524, 607-608) Likewise, since the challenged legislation places the decision-making authority

clearly in the hands of the Service Secretary and not the Secretary of Defense, it would appear that Capt. Vohden was incorrect when he intimated that the Secretary of Defense would veto a determination of death in a "50-50" situation. (A-597)

Consequently, this entire line of testimony was of very little utility, except that it showed the chaos and uncertainty that prevails because of the absence of criteria and demonstrated that important decisions, which profoundly affect the subject MIA's and their families, are made on "subjective reaction" basis which amounts to undisguised guesswork and speculation.

To plunge ahead, on the basis of this kind of guesswork, is particularly reprehensible when it is unnecessary to do so. Recent negotiations, with the Vietnamese have developed new methods for the exchange of information about the POW's and the MIA's. (A-649-651) As a result, the Vietnamese have started a new search (A-651, 652, 659, 660) and additional information is coming in periodically. (A-651, 661) Unfortunately, none of this seems to have any impact on the Department of Defense. Despite its knowledge of

these developments, it has apparently decided that it is "reasonable" to proceed with determinations of death without awaiting the outcome of this information exchange.

(A-550, 551) Again, the subject seems not to "pertain". (A-520)

This is not a case in which there is a single, unconstitutional abuse which can be handily pinpointed and identified. Rather, we are dealing with a series of separate wrongs, each of which, standing alone, is substantial and should be corrected. The MIA family witnesses who testified were clearly shown to be typical. (A-434, 478, 686) Their testimony was confirmed by others, including several witnesses produced by the government. The facts of this case, respecting the violation of due process rights are unusual in that they are completely uncontradicted and unchallenged. In addition to viewing these wrongs individually, however, it is obvious that, collectively, they obliterate any pretense of fairness in the activities and proceedings which lead to determinations of death. These due process violations, we submit, are overwhelming and present a virtually irresistible case on the merits.

Error and Abuse of Discretion

Obviously, the only legitimate purpose for an evidentiary record is to present the basis of the decision

that follows. We respectfully submit that the particularly unequivocal record made during the evidentiary hearing in the District Court is not reflected in Judge Weinstein's Opinion and Order.

Very early in that hearing, while a young MIA wife, who had become ill and was hospitalized during her trip to New York to testify (A-355-356), was on orderly, direct examination, Judge Weinstein engaged her in 27 pages of virtual combat in which, we submit, his pre-judgment of this case was made crystal clear. (A-378-405) The intensity of that confrontation is reflected in the fact that the Judge later apologized to the witness on the record. (A-463)

Obviously, that pre-judgment never changed. We submit that because of this, the District Judge ignored the unequivocal, uncontradicted proof of due process violations and purposefully refused, again and again, to permit offered, detailed proof of threatened irreparable injury into the record. As a result, the District Judge permitted a continuation of a gross injustice.

This, we submit, constituted clear abuse of discretion; also, clear error because it precipitated an insupportable view of the facts and a misapplication of the law by the District Court.

POINT I

THE DISTRICT COURT SHOULD BE
REVERSED BECAUSE IT ABUSED ITS
DISCRETION IN DENYING A PRE-
LIMINARY INJUNCTION IN THIS
CASE.

As discussed in the factual portion of this brief, the present action is one of those unusual ones where no real dispute developed as to the material facts alleged in the complaint. Plaintiffs submitted a list of these facts and defendants neither disproved nor even denied them. We submit that the individual and the cumulative effect of these proven wrongs precludes even the possibility of due process. This shall be further discussed, infra.

The factual aspects of irreparable injury have been discussed in this brief and the legal aspects shall be. Again, we submit that there is no room for argument in this area -- the threat is clear and, for the most part, is not influenced by the evidence submitted by defendants to partially mitigate it.

The matter of abuse of discretion must be viewed from this perspective in this case. The purposes of a preliminary injunction is to maintain the status quo pending

a final determination of the merits. Unicon Management Corp. v. Koppers Co., 366 F.2d 199 (2d Cir., 1966). Here, the status quo cannot be maintained in the absence of a preliminary injunction because of the continuation, during the litigation, of determinations of death.

Although the fundamental fairness of preventing irremediable harm to a party is an important factor on a preliminary injunction application, the most compelling reason in favor of [granting a preliminary injunction] is the need to prevent the judicial process from being rendered futile by defendant's action or refusal to act. Wright & Miller, Federal Practice and Procedure: Civil § 2947.

Generally, the proponent has the burden of establishing his probable success on the merits and the threat of irreparable injury if the injunction is denied. Sonesta International Corp. v. Wellington Associates, 483 F.2d 247 (2d Cir., 1973); See also, Mulligan, Preliminary Injunction in the Second Circuit, 43 Brooklyn Law Review 831 (1977).

In cases such as this, where all of the hardships have been shown by the plaintiffs and none have even been claimed by the defendants, the balance of hardships tips so

decidedly toward the party requesting the injunction (the plaintiffs) that the burden of showing probable success on the merits is reduced. Dino DeLaurentiis Cinematografica S.p.A. v. D-150, Inc., 366 F.2d 373 (2d Cir., 1966).

In such a case, the moving party may obtain a preliminary injunction by raising questions going to the merits so serious, substantial and difficult as to make them a fair ground for litigation and thus for more deliberate investigation. Unicon Management Corp. v. Koppers Co., supra; Dino DeLaurentiis Cinematografica S.p.A. v. D-150, Inc., supra; Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738 (2d Cir., 1953).

Plaintiffs, we submit, have far surpassed these tests.

Generally, the scope of review of the grant or denial of a preliminary injunction is whether it is "erroneous as a matter of law or the result of an improvident exercise of judicial discretion". 7 Moore's Federal Practice § 65.04(1) (2nd Ed.). The District Court does not exercise unbridled discretion, however. Canal Authority v. Callaway, 489 F.2d 567, 572 (5th Cir., 1974). Despite the discretion accorded the District Court with respect to

preliminary injunction, its grant or denial is subject to meaningful appellate review. W.E. Bassett Co. v. Revlon, Inc., 354 F.2d 868 (2d Cir., 1966).

The Appellate Court considers the merits to the extent necessary to review the exercise of discretion. Hornbach v. Brotherhood of R.R. Signalmen, 346 F.2d 161 (6th Cir., 1965). Hence, in this brief, it has been necessary to discuss the merits of the case presented in District Court.

In addition to the fact that the proven details respecting the violation of the constitutional rights of the MIA's were undisputed, it is significant that the District Court upheld the sufficiency of the complaint when it denied the defendants' motion for dismissal under Rule 12(b) F.R.Civ.P. It is clearly an abuse of judicial discretion to deny a preliminary injunction under these circumstances. Clemons v. Bd. of Ed. of Hillsboro, 228 F.2d 853 (6th Cir., 1956), cert. den. 350 U.S. 1006.

Much of this brief is devoted to discussion of the law that should be applied to the undisputed facts of this case. It was clearly an abuse of judicial discretion not to have done so. U.S. v. Beaty, 288 F.2d 653 (6th Cir., 1961).

We respectfully submit that the undisputed facts established on the record during the evidentiary hearing demonstrated a pattern of deprivation of human rights, and this will continue because the preliminary injunction was denied. Because of this it was an abuse of discretion to deny the injunction. Clemons v. Bd. of Ed. of Hillsboro, supra.

It has been shown that the District Court, in shutting off proffered evidence of threatened irreparable injury stated that such proof would be "not necessary". (A - 328). This clearly implied that the Court considered that fact adequately established. Subsequently, however, the District Court based the denial of the preliminary injunction partly on the alleged absence of such evidence. We submit that no court has discretion to mislead the litigants before it in such a manner.

It was necessary on this appeal, to deal at some length with the record made in the District Court because that analysis shows that the record is simply not reflected in the decision and order from which we appeal. As far as the District Court was concerned, it would seem the effort of furnishing that evidence was largely a waste of time. This, we submit, is where abuse of discretion in a most fundamental form, is involved.

It is basic to the just adjudication of disputes that the result will grow from and reflect the record. Instances where this has not occurred have caused concern among and been rejected by fair-minded people everywhere.

The trial judge's lack of receptivity to the evidence in this case is all the more surprising in light of his language in Cortright v. Resor, 325 F.Supp. 797, 819 (E.D.N.Y., 1971), which raised analogous issues:

"Due process generally requires an effective hearing. See Goldberg v. Kelly, 397 U.S. 254, 269, 90 S.Ct. 1011, 1021, 25 L.Ed.2d 287 (1970). The plaintiffs' opportunity to be heard was minimal at best. Cortright never appeared before the investigating officer, and his letter from Fort Bliss in support of his allegations was not a part of the record when the original findings and conclusions were made. No opportunity was given any of the plaintiffs to confront and cross-examine witnesses or even to see a summary of what they said. Compare Goldberg v. Kelly, id. at 269, 90 S.Ct. at 1021 (1970); Willner v. Committee on Character and Fitness, 373 U.S. 96, 103-105, 83 S.Ct. 1175, 1180-1181, 10 L.Ed.2d 224 (1963); Greene v. McElroy, 360 U.S. 474, 496-497, 79 S.Ct. 1400, 1413, 3 L.Ed. 2d 1377 (1959); I.C.C. v. Louisville & N.R. Co., 227 U.S. 88, 93-94, 33 S.Ct. 185, 187-188, 57 L.Ed. 431 (1913). Members of the Band who instituted the grievance proceeding were not allowed to obtain civilian counsel or discuss their participation in the Article 138 Proceeding with their already retained counsel. Compare Goldberg v. Kelly, 397 U.S. 254, 270, 90 S.Ct. 1011, 1022, 25 L.Ed.2d 287 (1970); Powell v. Alabama, 287 U.S. 45, 88-89, 53 S.Ct. 55, 77 L.Ed. 158 (1932)."

Plaintiffs do not know, nor do they need to know why discretion was abused in this case. It is clear that it did occur and, as a result, a heavy price is being paid.

POINT II

THE DENIAL OF A PRELIMINARY INJUNCTION TO
THE PLAINTIFFS WHO WILL SUFFER IRREPARABLE
INJURY FROM THE PROPOSED DETERMINATIONS OF
DEATH WAS ERROR.

- A. The United States Supreme Court Has Held That
Determinations of Death will Create Irreparable
Harm.
-

As a matter of law, under Sonesta International Corp. v. Wellington Associates, 483 F.2d 247 (2d Cir., 1973) and the cases which have followed it in this Circuit, a threat of irreparable injury must exist before an injunction can be granted.

In the two decisions of McDonald v. McLucas, 371 F.Supp. 831 (S.D.N.Y., 1974) and 371 F.Supp. 837 (S.D.N.Y., 1973), aff'd 419 U.S. 987 (1974), it was held that determinations of death under the Missing Persons Act create a threat of irreparable loss to dependents and beneficiaries of the subject MIA's, and both preliminary and permanent injunctions were granted.

This threatened loss refers solely to the derivative rights of such next-of-kin to allotments from the pay and allowances of the subject MIA which are terminated upon the determination of death. Thus, the loss dealt with in McDonald can and does occur only because of a simultaneous loss sustained by the subject MIA. It is this loss to the MIA that is the subject of the present action.

Consequently, it is inescapable, we submit, that the finding of threatened irreparable injury, in McDonald, requires a similar finding here. To hold otherwise would appear somewhat absurd.

B. The Facts of This Case Demonstrate That Plaintiffs Will Suffer Irreparable Harm From Determinations of Death

The criteria for the granting of a preliminary injunction are classically described as a showing of the probability of success and the possibility of irreparable injury. Telecommunication Corp. v. Franchises International Inc., 332 F.Supp. 469 (S.D.N.Y., 1971). The great strength of the plaintiffs' case and their probable success on the merits has already been shown. However, should the Government succeed in making determinations of death prior to the conclusion of this litigation, plaintiffs will be irreparably injured, notwithstanding their success on the merits.

This Court has held that "Irreparable harm can be found where there is a continuing wrong which cannot be adequately redressed by final relief on the merits. Such harm often resides where money damages cannot provide adequate compensation". New York Path. & X-Ray Lab, Inc. v. Immigration & Naturalization Service, 523 F.2d 79, 81 (2d Cir., 1975). In the instant case, plaintiffs will suffer harm in several ways from determinations of death. The details of this are discussed at pages 10 thru 17 , supra.

While in missing status each serviceman continues to receive his pay and allowances. On a determination of death, they will cease. Even if a reversal of the determination will permit the paying of back pay, it will not undo the damage to the serviceman from his family ceasing to receive his pay. For example, a wife of a serviceman may be making mortgage payments on the family home. Without the serviceman's salary,

she will be unable to continue such payments and would be forced to sell the family home. Since the purchasers could not be forced to return the home, the serviceman would have lost his home -- and perhaps the dream that went into its building.

Again, while in missing status, the serviceman is permitted to keep his pay on deposit in a so-called U.S.S.D.P. account at ten (10%) percent interest. Within ninety (90) days of a determination of death, such interest will cease (A-553-554). Reversal of the determination will not permit the Government to pay back interest since the Government cannot pay interest on a claim against itself in the absence of a specific statute. U.S. v. Consumers Scrap Iron Corp., 384 F.2d 62 (6th Cir., 1967). There is no statute permitting the payment of interest to a serviceman found to be alive after being declared dead. Indeed, the absence of power in the Government to pay interest has, by itself, been held a sufficient showing of irreparable harm to justify the granting of a preliminary injunction. Amoco Oil Company v. Zarb, 402 F.Supp. 1001 (D.C.D.C., 1975).

Still further, upon a declaration of death, the accumulated assets of the serviceman, in the hands of the Government, would be paid out. These assets, passing by way of state law would go to the heirs at law of any serviceman who did not leave a will. Such heirs may not be so friendly to the serviceman that they would give back the assets were he to be returned alive. Indeed, such a "laughing heir" might have spent the serviceman's accumulated earnings. Whether or not the military authorities wished to recompense the unexpectedly returned serviceman by making a second payment, this time to him, it would be unlawful for

them to do so. 10 U.S.C. 2771(d). The irreparable injury to the serviceman in such a case is clear.

The serviceman's family, and thru them the serviceman, would feel the impact of a determination arrived at by constitutionally improper means in yet another fashion. The family is not just a group of individuals. It is an organic whole. Destroy part of it and the whole is injured. An example of such injury is that which happened to the family described in Exhibit "A" of this brief -- the family of the defendant President Carter. That family never recovered from a determination that turned out to be erroneous. The plaintiff servicemen have a constitutionally protected liberty interest in the survival of their families. Moore v. City of East Cleveland, ___ U.S. ___, 52 L.Ed. 2d 531 (1977); Smith v. Organization of Foster Families, ___ U.S. ___, 53 L.Ed. 2d 14 (1977). The effects of a determination of their deaths would be irreparable. Such irreparable harm calls for the issuance of a preliminary injunction in this case.

Reference has been made, supra, at pages 11 thru 13 to the vague claim of a discretionary power to repay part of the economic losses sustained in some cases of faulty determinations of death. This was submitted by defendants in an effort to mitigate irreparable injury. A similar argument was made in the McDonald case and rejected at 371 F.Supp. 834:

"Defendants contend that the plaintiffs have not been deprived of any protected property interest because if a missing service member is actually still alive after a determination of death is made, any wages and allotments can be recovered under Section 556(d). This claim is without merit.

It is now well settled that a temporary, nonfinal deprivation of property is nonetheless a 'deprivation' in the terms of the Fourteenth Amendment. . . . The Fourteenth Amendment draws no bright lines around three-day, 10-day or 50-day deprivations of property. *Fuentes v. Shevin*, 407 U.S. 67, 84-85, 86, 92 S.Ct. 1983, 1996, 32 L.Ed. 2d 556 (1972)."

Thus, while there was some testimony of a vague and ambiguous possibility that some economic losses might be restored, this did not eliminate the threat of irreparable injury which flows from determinations of death. Judge Weinstein's reliance upon such testimony was demonstrably misplaced and erroneous.

POINT III

WHILE THE McDONALD CASE IS NOT DISPOSITIVE OF THE PRESENT ACTION, THE REASONING AND PRINCIPLES OF THAT DECISION HAVE A STRONG BEARING.

In his opinion, Judge Weinstein intimated that *McDonald v. McLucas*, 371 F.Supp. 831 (S.D.N.Y., 1974), aff'd 419 U.S. 987 (1974) might be dispositive of the present action. The reasons he gave for this are wholly and demonstrably erroneous.

First, Judge Weinstein observed that the class in *McDonald* was "extremely broad" and included all sorts of next-of-kin. ^(A-849-850) In fact, there was no class in *McDonald*. Plaintiffs had sought a class, but the Court refused to certify one. See, 371 F.Supp. 831 at 833, 834. And even if the class of next-of-kin described by Judge Weinstein had been certified, it is certainly clear by now that it contains no provision for the

protection of the individual rights of the subject MIA's themselves.

Secondly, Judge Weinstein states that the Supreme Court in McDonald "effectively affirmed the District Court's ruling that only those receiving benefits have standing to challenge sections 555 and 556". ^(A-850) The trouble here is that the District Court never made any such ruling. What happened is a matter of record.

As a comparison of the complaint in the present action with the McDonald complaint would show, Counts I and III of both complaints were quite similar. Also, Count IV of the present complaint is similar to Count V of the McDonald complaint. But, Count II of the present complaint alleges unconstitutionality of the challenged legislation as applied on 13 separate grounds, Count II in McDonald referred to only 4 grounds of such unconstitutionality and of these, only 3 are reflected in the present complaint. Nothing in the present complaint is analagous to Count IV of McDonald.

Apart from these distinctions, McDonald sought protection for the strictly derivative interests of next-of-kin while the present complaint does not. Consequently, the two actions began with significantly different complaints.

Count III of McDonald was never considered on the merits. It was dismissed by Judge Metzner, before a three-judge court was appointed, on a finding that the McDonald plaintiffs lacked standing to urge that claim. 371 F.Supp. 837, 840. Consequently, no court anywhere has considered and decided the merits of the issues raised in Count III of the complaints in both cases.

The only matter decided by the McDonald court was that next-of-kin who themselves are recipients of governmental benefits, have protected property interests which require that they receive notice and a hearing opportunity before those interests are terminated. 371 F.Supp. 831, 835, 836. Having done this, the McDonald Court then concluded that "the additional grounds urged for declaring the sections unconstitutional need not be considered" (emphasis supplied). 371 F.Supp. 831, 837.

Therefore, apart from the notice and hearing rights of certain next-of-kin who have constitutionally protected property interests of their own, no issues were adjudicated in the McDonald case and they all remain. The Court of Claims considered the question and agreed with this analysis in Crone v. U.S., 538 F.2d 875, 887 (1976). Indeed, if it could be claimed that the McDonald ruling actually bound MIA's, who did not appear therein, entry of judgment would clearly have been prohibited under 50 U.S.C. App. ¶520, since counsel had not been appointed to represent their interests.

The instant case involves the direct personal rights of the subject MIA's. McDonald, on the other hand, considered only the derivative rights of next-of-kin. McDonald, therefore, did not dispose of any of the issues raised herein.

Finally, Judge Weinstein suggests that McDonald may be dispositive with respect to "the form of the hearing. Although the nature of the hearing was challenged in plaintiffs' Supreme Court brief in McDonald, the Court ignored the issue in its affirmance. In effect, it approved the limited form of hearing required by McDonald". (A - 850).

Once again, there is a record to consult. McDonald expressly refrained from prescribing any particular form of procedure. 371 F.Supp. 831, 836. Consequently, the Supreme Court, in its affirmance without opinion, ratified no particular form.

Plaintiffs, obviously, would have preferred more explicit directions from the McDonald court and sought them on appeal to the Supreme Court. As the Government's motion to the Supreme Court for affirmance demonstrates, consideration of this matter was held to be moot by that time because new regulations had been issued governing status reviews - any alleged defects in those regulations should be litigated in another case. (A-899). We submit that this was the only rational basis that could justify the affirmance without opinion. The affirmance, therefore, does not dispose of issues respecting the new regulations, which are raised in the present litigation.

Furthermore, if Judge Weinstein were correct in his view that McDonald binds the plaintiffs and plaintiff class in the present action, it is abundantly clear that McDonald is now being violated by the defendants. The McDonald Court held that under minimum due process standards, notice must be given of a status review and "the affected parties" afforded a reasonable opportunity to attend the review, with a lawyer if they choose, and to have reasonable access to information. 371 F.Supp. 831, 836. On the basis of the proof submitted during the evidentiary hearing, if the subject MIA's are included in the term "the affected parties", there is no doubt that, with respect to the subject MIA's, the McDonald rule has been consistently violated.

There are elements of the McDonald decision which are of great significance to the current litigation. Unfortunately, it was not upon these that Judge Weinstein focussed. The following is clearly applicable:

"It is a well established principle that procedural due process is required in administrative proceedings when adjudication of fact are made which operate to deprive a person of a constitutionally protected interest. *Hannah v. Larche*, 363 U.S. 420, 80 S.Ct. 1502, 4 L.Ed.2d 1307 (1960), *Morgan v. United States*, 304 U.S. 1, 58 S.Ct. 773, 82 L.Ed. 1129 (1938).

"There is no question that an "official report of death," or a "finding of death" made by the defendants is an adjudication of fact. . . .

"Having concluded that the plaintiffs have a "property" interest at stake, the due process clause demands that some form of procedural protection is required. See, e.g., *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S. Ct. 2593, 33 L.Ed. 2d 484 (1972). In a line of Supreme Court decisions emanating from *Hannah v. Larche*, supra, it has been held that notice and an opportunity to be heard must be afforded before an individual can be deprived of a protected interest. See also, *Board of Regents v. Roth*, supra at 569-570, 92 S.Ct. 2701, 33 L.Ed.2d 548; *Fuentes v. Shevin*, supra at 82, 92 S.Ct. 1983, 32 L.Ed. 2d 556; *Bell v. Burson*, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971); *Boddie v. Connecticut*, 401 U.S. 371, 379, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971); *Wisconsin v. Constantineau*, 400 U.S. 433, 437, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971); *Goldberg v. Kelly*, supra at 261, 90 S.Ct. 1011, 25 L.Ed.2d 287. While the exact contours of these procedural elements vary accordingly to the interests involved (see, e.g., *Christian v. New York State Department of Labor*, 414 U.S. 614, 94 S.Ct. 747, 39 L.Ed.2d 38 (January 21, 1974)), the Court has repeatedly insisted that rudimentary due process is satisfied only by providing the "kinds of 'notice' and 'hearing' that are aimed at establishing the validity" of the deprivation in question. *Fuentes v. Shevin*, supra at 97, 92 S.Ct. 1983, 32 L.Ed.2d 556, quoting *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 343, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969) (Harlan, J. concurring); *Bell v. Burson*, supra at 540, 91 S.Ct. 780, 29 L.Ed.2d 90.

"These rudimentary procedural guarantees are absent from the face of the instant statutes. In addition, the stipulated statement of facts reveals that the services do not have any regulations requiring, and in fact, do not give, next-of-kin specific notice of the time and place of a review which might result in an "official report of death" or a "finding of death." The services also do not permit next-of-kin to attend or participate formally in any review or proposed status change." 371 F.Supp. 831, 834, 835, aff'd 419 U.S. 987 (1974).

Because each of the various wrongs that were demonstrated at the evidentiary hearing are in obvious collision with the essential fairness that these "rudimentary procedural guarantees" are designed to protect, they each violate due process requirements. Collectively, we respectfully submit, they are a disaster.

The rights and interests of dependants and beneficiaries ruled upon in McDonald are strictly derivative from, and are inextricably bound to, and were lost simultaneously with, those of the MIA's themselves. Therefore, the reasoning of and the legal principles controlling McDonald and the cases cited therein, are most significant now. The McDonald decision focussed upon the lost derivative rights and interests of dependants and beneficiaries of MIA's still in missing status, in confidence upon the assumption that "an agency of the Government would not persist in taking actions which violate the rights of a Service members next-of-kin, if the statutes are declared unconstitutional" and upon the belief that, in view of this disposition, "the additional grounds urged for declaring the sections unconstitutional need not be considered". 371 F.Supp. 831, 834, 837. The Court's confidence was obviously misplaced in both of these respects. The subsequent Regulations and conduct of the defendants demonstrate a persistent resolve to ignore due process rights.

Finally, due to the withholding of notice and hearing, the adjudicators of the fact of death acted without ever having acquired jurisdiction over those adversely affected by the determinations of death. Consequently, as to those MIA's who have been subjected to determinations

of death, the ex parte proceedings and all that flowed from them were void. Smith v. Apple, 6 F.2d 559, 563, 564 (8th Cir., 1925). See also, generally, Corpus Juris Secundum, Constitutional Law §619 and Notice §14. Therefore, those MIA's must be held to have been continuously in missing status regardless of these void determinations. This lack of jurisdiction affects the further determinations of death which are now threatened. They are wrong and obviously must be stopped.

POINT IV

EACH OF THE DEFECTS ALLEGED IN COUNTS 2 AND 3
OF THE COMPLAINT, STANDING ALONE, RENDERS THE
RESULTING DETERMINATIONS UNCONSTITUTIONAL.

The requirements of due process apply to administrative agencies and their proceedings. Voigt v. Webb, 47 F.Supp. 743. This is particularly so when such agencies exercise quasi-judicial powers. L. B. Wilson Inc. v. F.C.C., 170 F.2d 793. Indeed, a statute cannot authorize the exemption of an administrative agency from the requirements of due process. Juster Bros. v. Christgau, 7 N.W. 2d 501, 214 Minn. 108.

Due process is applied to administrative agencies with somewhat greater flexibility than to courts. Lacomastic Corp. v. Parker, 54 F.Supp. 138. However, it is required that the life, liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. Morgan v. U.S., 304 U.S. 1. The evidence considered must be revealed to the adversely affected parties who must be given the opportunity to explore such evidence and the determination of the agency must be rationally based on the evidence, Jordan v. American Eagle Fire Ins. Co.,

169 F.2d 281. To satisfy due process the administrative agency must be required to determine the existence or non-existence of the necessary facts before any decision is made. Mitchell v. Morris, 210 P 2d 857; 94 Cal. App. 2d 446; Wheeler v. Gregg, 203 P 2d 37, 99 Cal. App. 2d 348.

These fundamental principles have been repeatedly breached not only by the statutory provisions on determinations of death, 37 U.S.C. §§ 555 and 556, but also by the procedures employed by the defendants in making such determinations.

- a. Determinations of death made without provision for notice and a hearing opportunity for the subject MIA and without adequate examination of the fact of death, are unconstitutional.

Determinations of death cannot be validly made without provision to protect the due process rights of the subject individual. Thus, there must be adequate provision for notice, directly or through a fiduciary, to the subject absentee. Commonwealth v. Dollar Sav. Bank, 102 A.569, 259 Pa. 138; Carr v. Brown, 38 A.9, 20 RI. 215; Selden v. Kennedy, 52 S.E. 635, 104 Va. 826; Marine Nat'l. Exchange Bank of Milwaukee v. State, 22 N.W. 2d 156, 248 Wisc. 410. The lapse of a reasonable period of time and diligent inquiry as to the fact of death are required. Clapp v. Hong, 98 N.W. 710, 12 N.D. 600; Baltimore Sav. Bank v. Weeks, 64 A. 295, 103 Md. 601; Modern Woodmen of Amer. v. White, 199 P. 965, 70 Colo. 207; Borzage v. Metropolitan Life Ins. Co., 270 A. 2d 688, 6 Conn. Cir. 269; Bradford v. Culbreth, 10 A. 2d 534; Wiley v. Western & Southern Life Ins. Co., 250 N.W. 313, 264 Mich. 573; Campbell v. Nelson, 220 N.W. 401, 175 Minn. 51; Magers v. Western & Southern Life Ins. Co., 335 S.W. 2d 355; Armstrong v. Armstrong, 132 A. 237, 99 N.J. Eq. 19; Cavanaugh v. Valentine, 41 N.Y.S.2d 896, 181 Misc. 48; In re

Katz's Estate, 239 N.Y.S. 722, 135 Misc. 861; Moknach v. New York Life Ins. Co., 36 N.E. 2d 529, 67 Ohio App. 293; Grunda v. First Lithuanian Building & Loan Ass'n, 194 A. 747, 128 Pa. Super, 604.

Where the circumstances permit any explanation other than death for the absence, a more thorough search is required. Browne v. N.Y. Life Ins. Co., 57 F.2d 62; Robb v. Horsey, 181 A. 348, 169 Md. 227.

The inquiry must be such as exhausts all sources of information which the circumstances suggest. In re Layh's Estate, 55 Misc. 2d 92, 284 N.Y.S. 2d 511; Modern Woodmen of Amer. v. Michelin, 225 P. 163, 101 Okl.217; Modern Woodmen of Amer. v. Chromley, 139 P. 306, 41 Okl. 532.

The search should explore all places where information may be obtained and it must extend to all persons likely to have knowledge. Lemire v. National Life Ass'n, 191 N.W. 67, 194 Iowa 1245; Hill's Adm'x v. Metropolitan Life Ins. Co., 41 S.W. 2d 935, 240 Ky. 172; Donea v. Massachusetts Mut. Life Ins. Co., 19 N.W.2d 377, 220 Minn. 204; Cavanaugh v. Valentine, *supra*; Modern Woodmen of America v. Michelin, *supra*; New York Life Ins. Co. v. Nashville Trust Co., 159 S.W.2d 81, 178 Tenn. 437.

There is nothing new in the phenomenon of the missing man. The principles discussed above are typical of requirements that have evolved as our cultural standards and system of constitutional law developed. The conduct of the defendants, complained of herein, has been shown, during the evidentiary hearing, to violate, or at least ignore these criteria.

- b. Findings with no evidentiary support are arbitrary and capricious and a denial of *due* process.

An agency determination as to which any essential element is based on speculation or guesswork is per se arbitrary and capricious and thereby violative of the requirements of due process. B. & O. R. Co. v. U.S., 264 U.S., 258; Inland Motor Freight v. U.S., 36 F.Supp. 885; Puget Sound Nav. Co. v. Dept. of Transp., 206 P 2d 456, 33 Wash. 2d 448; Squire v. Nat'l. City Bank of Cleveland, 11 NE 2d 93, 56 Ohio App. 401.

The legislation to which plaintiffs object expressly provides for determinations of death without any shred of evidentiary support and the Secretaries concerned have routinely made such determinations.

The purported grant of authority to make findings of death without any evidentiary support is repugnant to the requirements of due process, as, indeed, is the attempted exercise of such power.

- c. Due Process requirements also prohibit the legislative grant of powers to an administrative agency without a policy or standard for their guidance. The purported exercise of such a defective grant of powers, unremedied by any grant of rule-making power, produced case-by-case adjudications which are unconstitutional because they are incapable of being reviewed against any measure or test.

It is a fundamental constitutional requirement that the legislature, in granting power, and particularly quasi-judicial power, to an administrative agency must provide standards for the guidance of the agency and must not vest the agency with arbitrary and uncontrolled discretion in the exercise of such power. Morgan v. U.S., 304 U.S. 1.

This basic requirement was violated in the present case by the failure of the legislature to provide any standards to guide the Secretaries

in making determinations of death. Indeed, there is not even provision for rule-making by the Services in this regard and the Secretaries are left in a situation where they make determinations on a case-by-case basis which cannot be tested by any standards.

The Supreme Court has made it clear that delegation of unrestrained authority to an executive official raises the gravest constitutional problems. A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495; Panama Ref. Co. v. Ryan, 293 U.S. 388; Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587-89. Justice Harlan, dissenting in part with Justices Douglas and Stewart in Arizona v. California, 373 U.S. 546, 603, stated the law ^{succinctly} ~~sufficiently~~:

"The principle that authority granted by the legislature must be limited by adequate standards serves two primary functions vital to preserving the separation of powers required by the Constitution. See the discussion in Comment, 14 Stan.L.Rev. 372. First, it insures that the fundamental policy decisions in our society will be made not by an appointed official but by the body immediately responsible to the people. Second, it prevents judicial review from becoming merely an exercise at large by providing the courts with some measure against which to judge the official action that has been challenged."

Thus, to avoid the pure delegation of legislative power, the legislature must set limits on the agency's power and enjoin on it a certain course of procedure and rules of decision in the performance of its functions. Roach v. Johnson, 48 F.Supp. 833 (vacated on other grounds, 319 U.S. 302). In the present case, this has not been done. Indeed, the whole procedure is characterized by the "subjective judgment" guesswork demonstrated by the testimony on "50-50" situations during the evidentiary hearing. Consequently, the legislation is invalid and its implementation by the Secretaries is unconstitutional.

POINT V

RECOURSE TO THE COURT OF CLAIMS AFTER A DETERMINATION OF DEATH IS NOT A VIABLE OR ADEQUATE REMEDY.

In his opinion, Judge Weinstein suggests that plaintiffs' remedy lies in enduring the cost and losses associated with determinations of death and then in attempting to recover in the Court of Claims. (A-850). This, of course missed the point, explained supra, that various elements of those losses are not recoverable. Furthermore, if there had been any warning that the Judge was concerned with this subject, we would have stressed the very obvious facts which were eventually presented in the affidavit of Russell Davis and which demonstrate that the Court of Claims is not a workable practical solution for anyone. (A-912-916).

Even if it offered some sort of an ultimate partial remedy, that is no excuse for evading the issues now when the damage can be stopped. The McDonald decision dealt with this problem admirably at 371 F.Supp. 835:

"Defendants' second argument is that no notice or hearing is required because any deficiencies in the statutory proceedings can be cured by subsequent judicial review. Assuming, arguendo, that such review is even available under this statute (see, Moreno v. United States, 93 F.Supp. 607 (Ct. Claims 1950), cert. denied, 342 U.S. 814, 72 S.Ct. 29, 96 L.Ed. 616 (1951); cf., Ferrer v. United States, 140 F.Supp. 954 (Ct. Claims 1955)), it would not cure the constitutional deprivation of property which inheres in a proceeding conducted without due process. As the Court observed in Stanley v. Illinois, 405 U.S. 645, 647, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972): "This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone." See also, Fuentes v. Shevin, 407 U.S. 67, 82, 92 S.Ct. 1983, 1210, 32 L.Ed.2d 556."

Plaintiffs-Appellants do not seek an opportunity to merely struggle in the future for the restoration of due process rights. They are in Court because they wish to preserve those rights now.

CONCLUSION

The denial by Judge Weinstein of the application for a preliminary injunction amounted to error and an abuse of discretion. We respectfully request that the District Court be reversed and that a preliminary injunction be granted now so that the damage being wrought by determinations of death while this action is being litigated, may be stopped.

Respectfully submitted,

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Military

Military duty has occupied a large portion of my life.

Even before I started in the first grade of school, I had already decided that I wanted to go to the U.S. Naval Academy at Annapolis, and my father agreed completely with this decision. I don't exactly remember the origin of the idea, but I think it was two-fold.

First, my mother's youngest brother was an enlisted man in the regular U.S. Navy. He was my distant hero, then serving in the Pacific fleet, a man thoughtful enough to send me at intervals small mementos of his visits to the foreign and exotic countries of the world. A letter or a photograph from my Uncle Tom Gordy was a memorable occasion in my young life.

Uncle Tom was lightweight fleet boxing champion around 1930, and we still have a famous (at least within the family) photograph of him standing proudly with boxing gloves, slightly in front of a group of

other men whom he had beaten. Our first family involvement in the Second World War came because of him.

My Uncle Tom, a radioman, was stationed on the island of Guam as part of a small communications contingent when the Pacific war started. He was captured a few days after the attack on Pearl Harbor, when the Japanese invaded that outpost island.

His wife, Dorothy, and their three children lived in San Francisco, and after Guam was captured they moved to Georgia to live with my grandmother and us at Archery.

After about two years we were all notified by the Red Cross that Tom was dead, and a few months later his widow and the children moved back to San Francisco to live with her own family.

She remarried a year or so later, but then when the war was over Uncle Tom was found alive in Japan, having been an isolated prisoner and a member of a train crew working on a Japanese railroad. He had been terribly ill and weighed less than 100 pounds. He eventually recovered after a long illness, but he and Dorothy were never reconciled, in part perhaps because of interference from members of our family and the blame which Tom's family placed on Dorothy because she had remarried.

The second reason for my early desire to attend Annapolis was that my college education would be assured, no small consideration during those early Depression years when the chance of a family-financed college education seemed slight. My daddy's service in the Army during World War I as a first lieutenant caused him to hold in high esteem the military training at the service academies and, because of my Uncle Tom's influence, the Naval Academy was my first choice.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss..

RICHARD MARVAS, being duly sworn,
deposes and says that deponent is not a party to the action,
is over 18 years of age and resides at 127 SECOND AVE
NEW YORK, N.Y.

That on the 30 day of DECEMBER, 1977,
deponent personally served the within BRIEF FOR
PLAINTIFFS-APPELLANTS
upon the attorneys designated below who represent the
indicated parties in this action and at the addresses below
stated which are those that have been designated by said
attorneys for that purpose.

By leaving 2 true copies of same with a duly
authorized person at their designated office.

~~By depositing true copies of same enclosed~~
~~in a postpaid properly addressed wrapper, in the post office~~
~~or official depository under the exclusive care and custody~~
~~of the United States post office department within the State~~
~~of New York.~~

Names of attorneys served, together with the names
of the clients represented and the attorneys' designated
addresses.

DAVID G. TRAGER
United States Attorney, Eastern District of New York
Attorney for Defendants-Appellees
225 Cadman Plaza East
Brooklyn, New York 11201

Richard Marvas

Sworn to before me this

30 day of December, 1977 Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Queens County
Commission Expires March 30, 1979